

STATE OF MICHIGAN
IN THE SUPREME COURT

DONNA DECOSTA,

Plaintiff-Appellant,

v

DAVID D. GOSSAGE, D.O., and
THE GOSSAGE EYE CENTER,

Defendants-Appellees.

SC No. 137480
COA No. 278665
LC No. 06-747-NM
[Hillsdale County CC]

BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellees Dr. Gossage and The Gossage Eye Center state that this Court has jurisdiction to consider and resolve plaintiff-appellant Donna DeCosta's application for leave to appeal pursuant to MCR 7.301(A)(2) and 7.302(G).

COUNTER-STATEMENT OF THE QUESTION PRESENTED

I.

DID THE TRIAL COURT PROPERLY GRANT DEFENDANTS' MOTION FOR SUMMARY DISPOSITION WHERE PLAINTIFF'S NOTICE OF INTENT WAS NOT MAILED TO THE "LAST KNOWN PROFESSIONAL BUSINESS ADDRESS," AS MCL 600.2912b(2) REQUIRES?

Plaintiff-Appellant Donna DeCosta answers "no."

Defendants-Appellees David Gossage, D.O., and The Gossage Eye Center answer "yes."

The Hillsdale County Circuit Court answered "yes."

The Michigan Court of Appeals answers "yes."

COUNTER-STATEMENT OF FACTS

A. Introduction.

This is a medical malpractice action in which plaintiff sent an insufficient notice of intent to defendants by failing to mail it to the “last known professional business address,” as required by MCL 600.2912b. Defendants moved for summary disposition under MCR 2.116(C)(1), (3), (7), (8), and (10), arguing that plaintiff mailed the notice of intent to the wrong address (46 S. Howell Street), because Dr. Gossage had stopped practicing at that location in February 2004, months before the notice of intent was mailed. (**Exhibit B, Tab 3, Affidavit of Dr. David D. Gossage, ¶ 4**).¹ Defendants explained that the limitations period was not tolled because plaintiff failed to comply with MCL 600.2912b, and thus plaintiff’s complaint filed after expiration of the limitations period was untimely. The trial court granted defendants’ motion for summary disposition. Plaintiff appealed by right to the Michigan Court of Appeals, which affirmed in an unpublished opinion dated September 2, 2008 (**Exhibit D**). Plaintiff then filed an application for leave to appeal with this Court, in which plaintiff seeks the grant of leave to appeal and reversal of the trial court’s order granting summary disposition.

For ease of reference, defendants provide material dates and events which affect the question of whether plaintiff complied with MCL 600.2912b. Defendants also summarize the trial court proceedings.

¹ Except as otherwise indicated, numeric tab references refer to the respective exhibits of defendants’ motion for summary disposition.

B. Statement of material dates and events.

The following is a table of relevant dates and events in this case and in Michigan law. Each is assumed true only for the purpose of summary disposition below and the application now before this Court. None is admitted.

<u>DATE</u>	<u>EVENT</u>
October 1, 1993	Effective date of the applicable version of statute requiring that notice of intent be mailed to last known address, MCL 600.2912b.
October 2002 – February 2004	Defendants' professional business address is 46 S. Howell Street, Hillsdale, MI 49242 (Exhibit B - Tab 3 , Affidavit of Dr. David R. Gossage, ¶ 4).
February 2004 – present	Defendants' professional business address is 50 W. Carleton, Hillsdale, MI 49242. (<i>Id.</i> , ¶ 5).
June 3, 2004	Time of the asserted malpractice (Exhibit B, Tab 6 - Complaint). ²
June 4, 2004	Plaintiff seen by defendants at 50 W. Carleton Road.
June 5, 2004	Plaintiff seen by defendants at 50 W. Carleton Road.
June 6, 2004	Plaintiff seen by defendants at 50 W. Carleton Road.

² Although plaintiff's complaint states that plaintiff presented to defendant on June 5-6, 2004, it appears that the date of the alleged malpractice relates back to the date of surgery. Therefore, the date of surgery, June 3, 2004, is used to calculate the limitations period.

October 24, 2004

Plaintiff's last visit to defendants, also at 50 W. Carleton Road. (**Exhibit B - Tab 3, ¶ 7**).

June 1, 2006

Mailing of plaintiff's notice of intent to incorrect address at 46 S. Howell Street. (**Exhibit B - Tab 2**).

June 3, 2006

Expiration of the two-year medical malpractice statute of limitations (MCL 600.58085(6)).

June 5, 2006

June 1st notice of intent delivered to incorrect address at 46 S. Howell Street.

June 6, 2006

Defendants received copies of June 1st notice of intent. (**Exhibit B - Tab 3, ¶ 9**).

June 7, 2006

Mailing of plaintiff's notice of intent to correct address at 50 W. Carleton Road.³

June 8, 2006

June 7th notice of intent delivered to correct address at 50 W. Carleton Road. (**Exhibit B - Tab 3, ¶ 8**).⁴

November 20, 2006

Filing of the summons and complaint in this case. (**Exhibit B - Tab 6, Complaint**).⁵

³ The first page of the letter was dated June 6, 2006, but the remaining six pages were dated June 7, 2006. (**Exhibit B - Tab 5, 6/6/06 Notice of Intent**).

⁴ Although plaintiff's notice of intent was sent to the correct address, it was insufficient to toll the statute of limitations because the statute of limitations had already expired on June 3, 2006.

⁵ It appears that plaintiff filed her complaint under a date calculated from *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000).

C. Statement of trial court proceedings.

Defendants Dr. Gossage and The Gossage Eye Center moved for summary disposition under MCR 2.116(C)(1), (3), (7), (8), and (10), asserting that the statute of limitations on plaintiff's claim had expired because she failed to serve a timely notice of intent to defendants' last known business address to toll the statute of limitations pursuant to MCL 600.5856(c). (**Exhibit B**, Defendants' Motion for Summary Disposition). Specifically, defendants argued that plaintiff's mailing of the notice of intent to the 46 S. Howell Street address on June 1, 2006 was insufficient because defendants' last known business address was 50 W. Carleton Road. Defendants maintained that plaintiff had knowledge of this new address because plaintiff had presented to that location for care and treatment on several occasions in 2004. (*Id.*, p 16). Furthermore, the fact that plaintiff mailed a second notice of intent to the Carleton Road address demonstrated that plaintiff believed the first notice had been mailed to the incorrect location. (*Id.*, pp 15-16). Defendants relied on *Fournier v Mercy Community Health Care System*, 254 Mich App 461; 657 NW2d 550 (2003), abrogated on other gds by 270 Mich App 42, 715 NW2d 96 (2006), for the proposition that a notice of intent mailed in contravention of MCL 600.2912b is ineffective and does not toll the statute of limitations. (*Id.*, p 12).

Plaintiff opposed the motion by alleging that by statute, it is not required that each defendant physically receive the notice of intent prior to the expiration of the statute of limitations, but only that plaintiff mail the notice by that time. (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Disposition, p 4). Accordingly, plaintiff maintained that the statute of limitations was tolled pursuant to MCL 600.5856(d) because she mailed the first notice of intent to the 46 S. Howell Street address on June 1, 2006, prior

to the June 3, 2006 expiration period, notwithstanding that the 46 S. Howell Street address was not the “last known professional business address.” (*Id.*, p 2). Plaintiff subsequently filed a supplemental brief, asserting essentially the same arguments addressed in her principal brief. (Plaintiff’s Supplemental Brief in Opposition to Defendants’ Motion for Summary Disposition).

The trial court held hearing on the motion on May 16, 2007. The trial court found *Fournier* controlled the issue and that plaintiff’s alleged good faith efforts were irrelevant. (**Exhibit C** - Tr 5/16/07, pp 31-32). The trial court deemed irrelevant defendants’ inability to show prejudice or delay where the language of the statute was clear that the notice “shall” be mailed to the last known address. (*Id.*, p 32). Accordingly, the trial court granted defendants’ motion for summary disposition. (*Id.*). A corresponding order was entered granting defendants’ motion for summary disposition and dismissing the case with prejudice (**Exhibit A**). This order provides the basis for plaintiff’s appeal.

D. The Court of Appeals’ opinion.

On September 2, 2008, the Court of Appeals issued its *per curium* opinion in which it affirmed (**Exhibit D**). The majority reasoned that plaintiff failed to mail her notice of intent to the defendants’ “last known professional ... or residential address,” as required by MCL 600.2912b(2) (slip opinion, page 2). It had been 2½ years, February of 2004, since the defendants practiced at the address to which the June 3, 2006 notice of intent was sent (*Id.*). Finally, and in addition, the Court of Appeals determined that plaintiff was aware of this move because she treated at the new location on at least seven occasions between June and October of 2004 (*Id.*). See generally majority opinion (Cavanagh, P.J. and Kelly, J.) (**Exhibit D**).

Judge Jansen filed a dissent in which she reasoned that the subject notice of intent tolled the period of limitations under MCL 600.5856(c) for a period of 182 days (even though it was sent to the wrong address) because there was no evidence to suggest that plaintiff was aware that the new address was the defendants' sole or exclusive address (**Exhibit D**, pp 1-2 (Jansen, J., dissenting)). Judge Jansen also reasoned that the defendants actually received the forwarded notice of intent, and accordingly the defendants were not prejudiced by the fact that plaintiff happened to send the notice of intent to the previous address (*Id.*). All the while, Judge Jansen "fully acknowledged" that the Court of Appeals itself had held that "[t]he Legislature's use of the word "shall" in subsection 2912b(2) makes mandatory the requirement that the notice be mailed in accordance with its provisions." (**Exhibit D**, page 2).

Plaintiff then filed her application for leave to appeal and supporting documents with this Court.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION WHERE PLAINTIFF'S NOTICE OF INTENT WAS NOT MAILED TO THE "LAST KNOWN PROFESSIONAL BUSINESS ADDRESS," AS MCL 600.2912b(2) REQUIRES.

A. Standard of review and supporting authority.

An appellate court reviews *de novo* a trial court's grant or denial of summary disposition. See *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999); *Groncki v Detroit Edison*, 453 Mich 644, 649; 557 NW2d 289 (1996); and *Beaty v Hertzberg & Goldon, P.C.*, 456 Mich 247, 253; 571 NW2d 716 (1997). Issues of statutory construction and other questions of law are also subject to review *de novo* by this Court. *Devillers v Auto Club Insurance Association*, 473 Mich 562, 566-567; 702 NW2d 539 (2005). An appellate court must review the record to determine if the movant was entitled to judgment as a matter of law. *Groncki, supra*.

B. Introduction – summary.

A plaintiff must mail a valid notice of intent to a defendant prior to the expiration of the statute of limitations to toll the limitations period for 182 days. MCL 600.2912b; MCL 600.5856(d). Pursuant to MCL 600.5805(6), the statute of limitations for a malpractice action is two years. Accordingly, plaintiff had until June 3, 2006 in which to mail defendants a notice of intent to the "last known professional business address," which in this case was 50 W. Carleton Road, Hillsdale, MI 49242. (**Exhibit B – Tab 3**, Affidavit of Dr. David D. Gossage, ¶ 5). Plaintiff failed to do this. Instead, plaintiff mailed a notice of intent to defendants' former business address, 46 S. Howell Street, Hillsdale, MI 49242, on June 1, 2006, notwithstanding the fact that plaintiff had seen and been treated by defendants at the

correct address numerous times in 2004. (**Exhibit B – Tab 3**, Affidavit of Dr. David D. Gossage, ¶¶ 6-7). Defendants did not receive that notice until after the limitations period had expired on June 6, 2007. (*Id.*, ¶ 9). On or about June 7, 2006, after the limitations period had expired, plaintiff mailed another notice of intent to the correct address at 50 W. Carleton Road, which defendants received on June 8, 2006. (*Id.*, ¶ 8). Therefore, because plaintiff did not comply with the clear and unambiguous language of MCL 600.2912b, the statute of limitations was not tolled. MCL 600.5856. Absent tolling, the two-year statute of limitations expired on June 3, 2006. Thus, plaintiff's November 20, 2006 complaint was untimely.

C. General law.

The limitations period for a medical malpractice action is two years. MCL 600.5805(6). Before filing suit, a plaintiff must mail to the potential defendant a notice of intent to file a claim "not less than 182 days before the action is commenced." MCL 600.2912b(1). The notice must be mailed to the defendant's "last known" business address pursuant to MCL 600.2912b(2), which provides, in pertinent part:

(2) The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim.

MCL 600.2912b(2). Pursuant to MCL 600.5856(d), serving a potential defendant with a notice of intent in compliance with MCL 600.2912b may toll the limitations period to accommodate the 182-day notice period. That section provides:

Sec. 5856. The statutes of limitations or repose are tolled:

* * *

(d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

MCL 600.5856(d). Because the language “given in compliance with section 2912b” is clear and unambiguous, the statute must be applied as written. *Rheaume v Vandenberg*, 232 Mich App 417, 422; 591 NW2d 331 (1999). Accordingly, the statute of limitations is not tolled if the notice of intent does not meet all the requirements of MCL 600.2912b. *Id.*; *Roberts v Mecosta County General Hospital*, 466 Mich 57, 64; 642 NW2d 663 (2002) (*Roberts I*); *Roberts v Mecosta County General Hospital*, 470 Mich 679, 686; 684 NW2d 711 (2004) (*Roberts II*).

D. Governing law.

Fournier v Mercy Community Health Care System, 254 Mich App 461, 657 NW2d 550 (2003), *abrogated recognized on other gds*, *Mazumder v University of Bd of Regents*, 270 Mich App 42; 715 NW2d 96 (2006), controls the issue in this case. In *Fournier*, the alleged medical malpractice occurred on July 7, 1998, when the decedent expired from a ruptured spleen. Letters of authority were issued on July 13, 1998, appointing plaintiff personal representative of the decedent’s estate. On July 12, 2000, plaintiff sent notices of intent, pursuant to MCL 600.2912b, to six proposed defendants. The notices were sent via FedEx, and were to be delivered on July 13, 2000. “Next day delivery was significant because the two-year statutory period of limitation, absent tolling provisions, expired on July 13, 2000.” *Id.* at 463. The six notices of intent were inadvertently packaged in the same envelope and sent to a single defendant at his residential address. The delivery was made on July 13, 2000; however, the defendant was out of town. The remaining defendants did

not receive their notices until between July 17-18, 2000, when they were distributed by the defendant. *Id.* at 463-464.

Plaintiff subsequently filed her complaint on January 10, 2001. Defendants moved for summary disposition, arguing that the statutory period of limitations had expired before they were sent. Specifically, defendants argued that the limitation period was not tolled by MCL 600.2912b because plaintiff failed to mail the notices of intent to defendants' last known residential or business addresses. Plaintiff argued in response that she complied with the statutory requirement that notices of intent be mailed before the limitation period expires, and that she had done so in good faith. The trial court found that plaintiff's mistake was not "fatal," and concluded that because all defendants received notice in a timely manner, the purposes of the statute were fulfilled. Defendants' motion for summary disposition was therefore denied. *Id.* at 464-465.

On appeal, the Court of Appeals reversed, holding that a "notice of intent served in contravention of MCL 600.2912b is ineffective and does not toll the period of limitation." *Id.* at 466. In so doing, the Court discussed the medical malpractice statutory procedural requirements:

"Generally, the limitation period for malpractice actions is two years from the time the claim first accrues. M.C.L. § 600.5805(5); *Solowy v. Oakwood Hosp. Corp.*, 454 Mich. 214, 219, 561 N.W.2d 843 (1997). However, a wrongful death saving provision applies if the deceased died either before or within thirty days after the period of limitation ended. M.C.L. § 600.5852; *McNeil v. Quines*, 195 Mich.App. 199, 202, 489 N.W.2d 180 (1992). Under the saving provision, the personal representative of an estate may begin a lawsuit within two years after letters of authority are issued, as long as the lawsuit is brought within three years after the two-year general period of limitation ended. M.C.L. § 600.5852; *McNeil*, supra at 202, 489 N.W.2d 180. Thus, under the particular facts of this case, the

period of limitation expired July 13, 2000, two years after the letters of authority were issued.

Before filing suit, a plaintiff must serve a notice of intent on potential defendants. M.C.L. § 600.2912b provides:

(1) Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

Serving a potential defendant with a notice of intent under M.C.L. § 600.2912b may toll the limitation period to accommodate the 182-day notice period:

The statutes of limitations or repose are tolled:

* * *

(d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b. [M.C.L. § 600.5856.]

Because the language of M.C.L. § 600.5856(d) is clear and unambiguous, a plaintiff must comply with the stated requirements of the statute. See *Rheaume*, supra at 423, 591 N.W.2d 331 (“The negative implication of this section is that the statute of limitations is not tolled if the notice of intent to sue does not comply with § 2912b.”). In the case at bar, the issue is whether plaintiff complied with the statutory requirements for tolling the statutory period of limitation.

[4] With respect to the general requirements of the notice, M.C.L. § 600.2912b(2) provides:

The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim. Proof of the mailing constitutes prima facie evidence of compliance with this section. If no last known professional business or residential address can reasonably be ascertained, notice

may be mailed to the health facility where the care that is the basis for the claim was rendered.

The language of subsection 2912b(2) clearly requires that the notice 'shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim.' FN4 The Legislature's use of the word 'shall' in subsection 2912b(2) makes mandatory the requirement that the notice be mailed in accordance with its provisions. See *Scarsella v. Pollak*, 461 Mich. 547, 549, 607 N.W.2d 711 (2000), quoting *Scarsella v. Pollak*, 232 Mich.App. 61, 62-65, 591 N.W.2d 257 (1998) (explaining that use of the word 'shall' indicates a mandatory rather than a discretionary provision)."

Id. at 466-468. Applying this law to the facts, the *Fournier* Court noted that the two-year saving statute period began on July 13, 1998, the date letters of authority were issued. The saving period therefore expired on July 13, 2000. On July 12, 2000, plaintiff mailed six notices of intent to a single defendant's home, in which the other defendants did not receive their notice until after the limitation period expired. Therefore, "[b]ecause plaintiff did not provide notice 'in compliance with' MCL 600.2912b, the limitation period was not tolled by MCL 600.5856(d)." *Id.* at 468-469. Accordingly, plaintiff's complaint dated January 10, 2001 was untimely. In reaching this conclusion, this Court rejected plaintiff's argument that her "good faith" efforts to provide notice to the defendants operates to save her cause of action. Specifically, the *Fournier* Court noted that MCL 600.2912b "does not contain a good faith requirement, but, rather, a specific requirement that the notices be mailed to the last known business or residential address of defendants." Accordingly, defendants' inability to show prejudice or delay was irrelevant. *Id.* at 469.

E. **Argument.**

1. **Plaintiff's notice of intent was insufficient because it was not mailed to defendants at "the last known professional business address" as required by MCL 600.2912b(2).**

Plaintiff's theme throughout her application is that she complied with MCL 600.2912b because the first notice of intent was mailed to defendants on June 1, 2006, two days before the limitations period expired. According to plaintiff, this was sufficient to toll the limitations period. MCL 600.2912b. Defendants submit to this Court that whether the notice of intent was timely mailed is not the issue. Rather, the real issue, which plaintiff is artfully sidestepping, is the legal effect of the notice of intent that was not sent to the "last known professional business address." That effect, simply put, is this - failure to send the notice of intent to the last known address violates MCL 600.2912b's clear and unambiguous requirement, and thus does not toll the statute of limitations.

MCL 600.2912b provides, in pertinent part:

"The notice of intent to file a claim required under subsection (1) shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim."

MCL 600.2912b(2) (emphasis added). Use of the word "shall" makes the requirement that notice be mailed to the last known address mandatory. *Fournier, supra*, at 468; *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Accordingly, plaintiff was required to mail the notice of intent to the last known address, 50 W. Carleton Road, Hillsdale, MI 49242, by June 3, 2006 in order to receive the benefit of MCL 600.5856's tolling provision.

It is undisputed that plaintiff did not mail the June 1, 2006 notice of intent to 50 W. Carleton Road address. (**Exhibit B – Tab 2**, mail receipts). Instead, plaintiff mailed the notice to 46 S. Howell Street, Hillsdale, MI. (*Id.*) Plaintiff attempts to justify this deficiency

by maintaining that 46. S. Howell Street was Dr. Gosage's last known business address. The record evidence reflects otherwise. Dr. Gossage testified via affidavit that his business has been located at 50 W. Carleton Road since February 2004. (**Exhibit B – Tab 3**, Affidavit of Dr. David D. Gossage, ¶ 5). This is consistent with documentation from the Michigan Department of Labor and Economic Growth, identifying defendants' address as 50 W. Carleton Road. (**Exhibit B – Tab 4**, Michigan Department of Labor and Economic Growth Annual Statements and Annual Report). Most notably, though, plaintiff herself presented to the Carleton Road location numerous times in 2004. In fact, defendants treated plaintiff exclusively at 50. W. Carleton, Hillsdale, Michigan 49242 in 2004, for all visits relevant to the asserted malpractice. (**Exhibit B – Tab 3**, Affidavit of Dr. David D. Gossage, ¶ 6). Specifically, plaintiff was examined by defendant at his office on 50 W. Carleton Road on June 4, 2004, and June 5, 2004. (*Id*; **Exhibit B – Tab 6**, Complaint, ¶¶ 23, 27, 31). Thus, plaintiff either knew or had reason to know that defendant's "last known address" was at 50 W. Carleton Road. If plaintiff had any doubts as to the accuracy of the address, she could have referenced everyday sources to verify the address, such as the phone book. Given this evidence establishing that defendants' last known address was 50 W. Carleton Road, plaintiff did not comply with MCL 600.2912b by mailing the notice of intent to the 46 S. Howell Street address.⁶

Fournier v Mercy Community Health Care System, 254 Mich App 461; 657 NW2d 550 (2003), supports this conclusion. *Fournier* involved a similar situation in that, like here, plaintiff did not mail the notices of intent to the last known address of the defendants. Rather, the *Fournier* plaintiff mailed all six notices to one defendant at his home address,

⁶ Plaintiff has never argued that the second notice of intent, mailed on June 7, 2006, operates to toll the statute of limitations.

allegedly the result of a clerical oversight. *Id.* at 463. Just as in the instant case, the defendants in *Fournier* did not receive their notices until after the limitations period had expired. Finally, just as the trial court held that the plaintiff's notice was in contravention of MCL 600.2912b, the *Fournier* Court reversed the trial court's denial of defendants' motion for summary disposition, holding that because MCL 600.2912b specifically requires that notice be mailed to the last known business or residential address of defendants, failure to comply with the statute did not toll the limitations period. Thus, just as the plaintiff's complaint was untimely in *Fournier*, so also the plaintiff's complaint was time-barred here.

..... In a final plea to this Court, plaintiff requests that this Court excuse compliance with MCL 600.2912b because defendants allegedly actually received notice. In essence, plaintiff is asking this Court to act equitable with respect to a legal determination. This is wrong. The law in Michigan is clear that equity may not be exercised as "an omnipresent and unassailable judicial trump card that can be used to rewrite a constitutionally valid statute." *Devillers v Auto Club Insurance Association*, 473 Mich 562, 588; 702 NW2d 539 (2005). In other words, the court cannot use equity to trump the language of a clear and unequivocal statute. *See Ward v Siano*, 272 Mich App 715; 730 NW2d 1 (2007).

2. Response to plaintiff's argument.

Defendants take this opportunity to address several additional points made by plaintiff in her application for leave to appeal. First, on page 13 of her brief, plaintiff argues that MCL 600.2912b merely requires that the notice of intent be mailed prior to the expiration of the statute of limitations, not that each defendant physically receive the notice by that time. Second, plaintiff advocates that the fact that the notice of intent delivered to

the 46 S. Howell Street address was signed for establishes that the address was correct. Defendants address the deficiencies of each of these arguments below.

MCL 600.2912b(2) states, in pertinent part, that the notice of intent “shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of this claim. Proof of mailing constitutes *prima facie* evidence of compliance with this section.” Relying on this second sentence, plaintiff argues that her placement of the notice of intent in the mail before the two-year statutory period of limitations expired conclusively established her compliance with MCL 600.2912b. This is incorrect. Proof of mailing constitutes *prima facie* evidence that the notice of intent was mailed on a particular date, not that it complied with the statute. See *Fournier, supra* (rejecting the argument merely placing the notice of intent in the mail prior to the expiration of the limitations period is sufficient under MCL 600.2912b).

Next, plaintiff argues that the only logical explanation for the fact that the notice of intent was signed for at the 46 S. Howell Street address is that defendants were then-practicing at that location. Counsel for plaintiff elaborated on this theory at the summary disposition hearing:

“Perhaps the most important piece of evidence why I think this Court ought to deny the motion is that on June 1 – and I have the original records here from the post office, which were sent certified return receipt mail – a package containing the notice of intent was sent to 46 S. Howell, addressed to David D. Gosage. It was signed for by someone who apparently Dr. Gossage isn’t familiar with. The problem with that and the defense now saying, well, we didn’t accept it, is that if in fact Dr. Gossage was not practicing there or was not accepting mail there, then one would expect the person who received that package to say, Dr. Gossage isn’t here, I don’t know who this person is, I don’t have any responsibility to forward on mail. That never happened. That package was received and accepted.”

(Exhibit C, Tr, 5/16/07, p 13). Upon inquiry by the trial court, plaintiff's counsel admitted that he was unable to ascertain the name of the individual who signed for the mail at 46 S. Howell Street and the connection, if any, between that individual and defendants. (*Id.*, pp 14-15). The trial court therefore rejected this argument and granted summary disposition in defendants' favor.

This ruling was proper. It is a logical fallacy to conclude that the 46 S. Howell Street address was proper merely because an unidentified individual signed for the notice of intent at that address. This is a classic example of a disjunctive syllogism. A disjunctive syllogism consists of an "if, then not" as its major premise, a minor premise "categorically affirming or denying one of the alternative propositions," and "a conclusion which categorically denies or affirms the other alternative." Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 10-18 (Clark Boardman Callaghan, 1992). This logical fallacy omits the possibility of a third alternative:

"The indispensable prerequisite to a valid conclusion in the case of a disjunctive syllogism is that the major premises express a complete disjunction in the sense that its alternative terms be mutually exclusive and collectively exhaustive. They admit of no third possible alternative."

Id. When arguing that if the notice of intent was accepted and signed for by someone at the 46 S. Howell address, then it was not the wrong address, plaintiff omits the possible third alternative – that it was the wrong address notwithstanding the fact that the notice had been signed for and accepted. The third alternative is supported by the simple fact, as mentioned during oral argument, that the unknown individual signed for and accepted the package even though defendant was not practicing at that address. (Exhibit C, Tr, 5/16/07, p 13). Without any proof of a nexus between the individual who signed for the

notice of intent and defendants, plaintiff's argument is properly rejected by this Court. Affirmance of the trial court's grant of summary disposition is proper.

3. Response to the Court of Appeals' dissent.

In the dissenting opinion of the Court of Appeals, Judge Jansen reasons that the Legislature did not take into account the fact that healthcare professionals may maintain more than one professional address at any given time. She thus contests the fact and the significance that the plaintiff was aware of the defendants' new address. See **Exhibit D**, page 2 (dissent). She concludes:

"Despite the fact that plaintiff had seen defendants at the new address, I cannot conclude on the facts of this case that plaintiff did not send her initial notice of intent to defendants' 'last known ... address.'"

(*Id.*).

There are several difficulties with this position. First and foremost, the legislative mandate is that the notice of intent "shall be mailed to the last known professional business address or residential address of the health professional or health facility who is the subject of the claim." MCL 600.2912b(2) (emphasis supplied). The burden is on the plaintiff to satisfy this tort reform measure of Michigan law. It is not the defendants to disprove that the notice of intent was sent to the proper address. Thus, Judge Jansen errs when she concludes:

"I perceive no evidence to suggest that plaintiff was aware that the new address was defendants' *sole* or *exclusive* address."

(*Id.*) (emphasis original). Plaintiff did not demonstrate by documentation that the defendants had alternative professional addresses. On the contrary, the evidence is clear that the defendants had moved to the new address 2½ years after the notice of intent was

sent, and after the plaintiff herself had visited that address on no less than seven occasions. Thus, even though the defendants did not need to disprove the fact of an alternative professional address, the overwhelming evidence submitted to the trial court in the motion for summary disposition is that the last known professional address was indeed different than that to which the notice of intent was sent.

The dissent next argues that the *Fournier* case is distinguishable because the plaintiff in the instant case did not send her initial notice of intent to an unrelated address, but rather sent it to a valid, known address where she had previously sought treatment from defendants. This is a distinction without any legal significance in light of the Legislature's mandate that the notice of intent be sent to the defendants' "last known ... address." Taking the dissent's reasoning to its logical conclusion would be to remove the phrase "last known" from modifying "address," which directly violates the rules of statutory construction. "In reviewing the statute's language, every word shall be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). When the language of a statute is clear and unambiguous, judicial construction is neither required nor permitted. *Frankenmuth Mutual Insurance Company v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

The last point made by the dissent is legal significance placed in the argument that the defendants actually received plaintiff's initial notice of intent. The dissent reads significance in this dynamic, contrary to the statutory mandate, by use of MCL 600.2301, which provides in pertinent part:

“The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.”

In *Boodt v Borgess Medical Center*, 481 Mich 558, 563, n4; 751 NW2d 444 (2008), this Court found inapplicable section 2301 to cure a defective notice of intent. The *Boodt* court reasoned that section 2301 applies only to pending actions, and that the failure to provide a proper notice of intent prevented the action from commencing. *Id.* The *Boodt* court also determined that section 2301 applies only to “process, pleading, or proceeding,” and that there is no caselaw for the proposition that a notice of intent constitutes any of these terms, including a “proceeding.” *Id.*

Given that MCL 600.2301 is inapplicable, and the failure of the dissent to provide any other vehicle by which its view of “equity” should be applied to trump the legislative mandate of section 2912b(4), the dissent’s argument should be rejected.


RELIEF

WHEREFORE, defendants-appellees David Gossage, D.O., and The Gossage Eye Center, request this Court deny leave to appeal, and otherwise leave intact the trial court's May 30, 2007 order granting defendants' motion for summary disposition, and issue any other relief deem warranted, including costs and attorney fees.

Respectfully submitted,

PLUNKETT COONEY

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